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Case No. CV-0830008

Dept. No. II

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LINCOLN

CARTER-GRIFFIN, INC., et al.,
and CAVE VALLEY RANCH, LLC,

Petitioners,

vs.

TRACY TAYLOR, Nevada State
Engineer; STATE OF NEVADA
DIVISION OF WATER RESOURCES;
DOES I through X; and ROE
CORPORATIONS I through X,
inclusive,

Respondents,

SOUTHERN NEVADA WATER
AUTHORITY,

Real Party in
Interest.

ORDER VACATING AND REMANDING
STATE ENGINEER'S RULING

Petitioner Carter-Griffin, Inc. has requested judicial review of the Nevada State Engineer's Ruling Number 5875 issued July 9, 2008. That ruling granted a transfer of 18,755 acre feet of water annually to the Real-Party-in-Interest from the Cave, Dry Lake, and Delamar Valleys in eastern Nevada, pursuant to the Real-Party-in-Interest's applications 53987, 53988, 53989, 53990, 53991, and 53992. This matter has been fully

1 briefed and oral arguments held. Having examined all relevant
2 pleadings and papers on file herein, having considered the
3 arguments of counsel presented during the hearing, and good
4 cause appearing, the Court now enters the following order:

5 I. Summary of the Case

6 In 1989, the Las Vegas Valley Water District ("LVVWD")
7 filed multiple applications to transfer ground water from
8 several rural basins in east-central and southern Nevada.
9 Administrative Record at 7087. Thereafter, the Southern Nevada
10 Water Authority ("SNWA") was created and acquired rights to
11 pursue these applications. AR at 2. The petition before the
12 Court deals with only some of those applications, specifically
13 Cave Valley: applications 53988 and 53897; Delamar Valley:
14 applications 53991 and 53992; and Dry Lake Valley:
15 applications 53989 and 53990. AR at 2545-56. Through these
16 applications, SNWA sought to acquire rights to 34,752 acre feet
17 of water annually within the three basins. AR at 6393.

18
19 Certain applications for water rights in Spring Valley not
20 subject to this petition were ruled upon by the State Engineer
21 on or about April 16, 2007. AR at 6252. On January 7, 2008,
22 SNWA entered into a stipulated agreement with several
23 governmental agencies whereby the agencies abandoned their
24 protests against the applications included in this matter,
25 among others, provided that SNWA entered into a three-body
26 board to oversee and mitigate pumping impacts on east-central
27 and southern Nevada. AR at 2446-83.
28

1 Thereafter, in February 2008, the State Engineer held a
2 two week hearing on the applications concerning Cave, Delamar,
3 and Dry Lake Valleys. Multiple protestants, including but not
4 limited to the petitioners in this case, appeared and presented
5 evidence. See AR at 11544-579, 12185-87, 12170, 12248-249,
6 12209-219, 12676-701, 12651-670, 12704-705, 12707-12711. SNWA
7 presented evidence regarding the perennial yields of the
8 subject valleys. AR at 23, 1190-92, 1236-40, 1251. The
9 protestants meanwhile also presented impact evidence,
10 referencing a model which SNWA declined to present as evidence.
11 AR at 1236-1240, 1524-50, 12675-702.

12
13 Approximately five months later, the State Engineer issued
14 Ruling No. 5875 partly granting SNWA's applications regarding
15 the Cave, Delamar, and Dry Lake Valleys. AR at 2-41. In his
16 decision, the State Engineer changed the published perennial
17 yields for each of the basins. AR at 9. In each case, SNWA
18 was granted most of the newly created amounts. AR at 40.
19 Regarding the remainder, among other things the State Engineer
20 reserved 0.5 acre-feet per year per projected residential
21 house, although 2 acre-feet per year is the allowable
22 residential use. AR at 36-37; NRS 534.180.

23 II. Standard of Law

24
25 Upon a petition for judicial review, the Court is confined
26 to considering the administrative record. NRS 533.450(1). The
27 proceedings in every case must be heard by the Court, and must
28 be informal and summary, but full opportunity to be heard must

1 be had before judgment is pronounced. NRS 533.450(2).

2 In reviewing the record, the Court must treat the State
3 Engineer's decision as "prima facie correct, and the burden of
4 proof shall be upon the party" challenging the decision.
5 NRS 533.450(9). The Court may not substitute its judgment for
6 that of the State Engineer, but is limited to determining
7 whether there is substantial evidence in the record to support
8 the decision. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262,
9 264 (1979). Substantial evidence is "that which a reasonable
10 mind might accept as adequate to support a conclusion." *Bacher*
11 *v. Office of the State Eng'r of Nev.*, 122 Nev. 1110, 1121, 146
12 P.3d 793, 800 (2006).
13

14 [A] conclusion that substantial evidence supports the
15 findings of the State Engineer does not, however, dispose of
16 the . . . appeal. The applicable standard of review of the
17 decisions of the State Engineer, limited to an inquiry as to
18 substantial evidence, presupposes the fullness and fairness of
19 the administrative proceedings: all interested parties must
20 have had a "full opportunity to be heard," see NRS 533.450(2);
21 the State Engineer must clearly resolve all the crucial issues
22 presented, see *Nolan v. State Dep't of Commerce*, 86 Nev. 428,
23 470 P.2d 124 (1970) (on rehearing); the decisionmaker must
24 prepare findings in sufficient detail to permit judicial
25 review, *id.*; *Wright v. State Insurance Commissioner*, 449 P.2d
26 419 (Or. 1969); see also NRS 233B.125. When these procedures,
27 grounded in basic notions of fairness and due process, are not
28 followed, and the resulting administrative decision is
arbitrary, oppressive, or accompanied by a manifest abuse of
discretion, this court will not hesitate to intervene. *State*
ex rel. Johns v. Gragson, 89 Nev. 478, 515 P.2d 65 (1973).

22 *Revert*, 95 Nev. at 786, 603 P.2d at 264.

23 The Court is free to decide purely legal questions *de*
24 *novo*. *Town of Eureka v. Office of the State Eng'r of Nev.*, 108
25 Nev. 163, 165, 826 P.2d 948, 949 (1992). A purely legal
26 question is one that is not dependant upon, and must
27 necessarily be resolved without reference to, any fact in the
28

1 case. *Beavers v. Department of Motor Vehicles & Pub. Safety*,
2 109 Nev. 435, 438 n.1, 851 P.2d 432, 434 n.1 (1993). While the
3 State Engineer's interpretation of law is persuasive, and the
4 court should give it great deference when it is within the
5 language of the applicable statutory provisions, it is not
6 controlling. *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 950;
7 *Andersen Family Assocs. v. Ricci*, 124 Nev. Adv. Rep. 17, 179
8 P.3d 1201, 1203 (2008).

9
10 III. The State Engineer's Decision was Arbitrary,
11 Oppressive, and a Manifest Abuse of Discretion.

12 The State Engineer acknowledged within his Ruling that all
13 water rights previously available in the three basins at issue
14 had already been fully distributed. The State Engineer then
15 declared that the perennial yields available within the three
16 basins had increased, thereby creating additional acre-feet
17 annually ("afa") eligible for distribution.

18 In the process, the State Engineer reserved some of the
19 new afa for future growth in the basins. However, no evidence
20 was cited by the State Engineer in reaching his conclusions
21 regarding how much water should be retained for future use
22 within those basins. Instead, his conclusory findings were
23 simply allowed to speak for themselves. For instance, the
24 State Engineer uttered the following within the Ruling:

25
26 the State Engineer does not believe that hundreds or thousands
27 of homes will be built within the next 50 to 60 years as argued
28 by Cave Valley Ranch. The State Engineer finds if the entire
4,692 acres of potentially developable land was parceled into
5-acre lots this would equate to 938 lots; however, he does not
believe it is reasonable to think that all 938 lots will be

1 developed. Therefore, the State Engineer finds that it is
2 reasonable to consider that up to one half of these 938 lots or
3 469 lots has the possibility of a second-home/vacation-home
4 being built on them in the future.

5 Under NRS §534.180(1) the allocation of a domestic well
6 is 2.0 acre-feet per year and while it is true that any
7 domestic well drilled in Cave Valley will have the statutory
8 authority to withdraw the stated 2.0 acre-feet per year, from a
9 management perspective it is highly unlikely this would be the
10 case. If a property is occupied 60 days per year this equates
11 to the prorated equivalent of 0.33 acre-feet per year. To
12 account for some permanent residences and to ensure sufficient
13 unappropriated water is left in Cave Valley, an allocation of
14 0.5 of an acre-foot per year will be used for each potential
15 lot. The State Engineer finds it is reasonable to leave 0.5
16 afa for each of the 469 lots for future growth and development
17 for a total of 235 afa. the State Engineer finds water should
18 also be left in the basin for other uses, such as stock-
19 watering and minor commercial uses; therefore, an additional 40
20 afa will be left in the basin for other uses such as stock-
21 watering and minor commercial for a total of 275 afa total
22 being left in the basin of origin for future growth and
23 development.

24 AR at 36-37.

25 As described by the State Engineer, these conclusions and
26 findings were simply based upon his belief. No evidence was
27 cited for the conclusions, let alone substantial evidence, with
28 the State Engineer citing instead to his management
perspective. Thus the State Engineer's conclusion about the
proper amount of afa to be reserved within Cave Valley was his
best guess as the State Engineer. This by definition was
arbitrary, particularly where only 0.5 acre-feet per year per
projected residential house was reserved for future growth,
even though 2 acre-feet per year is the allowable residential
use.

Similarly, in a prior ruling, the State Engineer declined
to allow the distribution of greater amounts of water annually
without significant studies being undertaken to demonstrate

1 that existing use was not already stressing the aquifers at
2 issue, AR at 5794-5804, yet here, the State Engineer simply
3 decided that the applicant's proffered models were sufficient
4 to increase the perennial yields, with monitoring and
5 mitigation plans referenced as sufficient in the event the
6 State Engineer was wrong.

7 This solution portends a water rights manager seeking a
8 resolution to a problem that has been pending since the
9 applications at issue were first tendered in 1989, namely the
10 competition for water between the urban landscape of Southern
11 Nevada and its rural brethren. In the past, the State Engineer
12 required specific empirical data before taking the significant
13 step of allowing existing water to be transferred out of basin.
14 In Ruling No. 5875 however, the State Engineer was satisfied by
15 normative, predictive data without detailing why that change
16 was acceptable. While this may have resolved the water
17 management problem presented by the applications, the sudden
18 resolution of simply 'printing more money' or mining for water
19 by declaring that more afa was available when viewed through a
20 new prism, without explanation as to what changed to allow the
21 new approach, presents the essence of an arbitrary decision.

22 As acknowledged by the State Engineer, "in dry valleys it
23 takes an exceedingly long time to reach equilibrium and effects
24 will eventually spread out from the basin of origin and will
25 affect the down-gradient basins of White River Valley and
26 Pahranaagat Valley." AR at 22. Despite this statement, the
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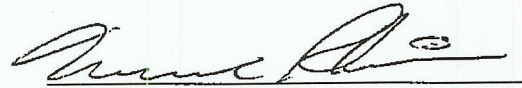
1 State Engineer both changed the method by which the existing
2 perennial yields were measured and granted the applications
3 without a clear understanding of the consequences, simply
4 relying upon the eventual outcome as the measure in the form of
5 a monitoring and mitigation program. Thus, the State
6 Engineer's ruling results in an oppressive consequence for the
7 basins affected, with the State Engineer simply hoping for the
8 best while committing to undo his decision if the worst occurs
9 despite the exceedingly long time required to reach equilibrium
10 and the effects which will eventually spread out from the basin
11 of origin and affect the down-gradient basins. Capriciousness
12 by the State Engineer is the reasonable conclusion.
13

14 In effect, the State Engineer's ruling that there was
15 newly unappropriated water available for export from Cave
16 Valley, Dry Lake Valley and Delamar Valley led to the further
17 conclusions that the applicant's proposed use will not conflict
18 with existing rights or protectible interests in existing
19 domestic wells, nor threaten to prove detrimental to the public
20 interest. Without those impediments, according to the State
21 Engineer NRS 533.370(5) mandated the granting of the water
22 rights applications. AR at 40. However, having acted
23 arbitrarily, capriciously and oppressively regarding the base
24 conclusion pertaining to the perennial yields and the further
25 conclusions flowing therefrom, the Court finds that the
26 required burden of proof has been met. The State Engineer
27 abused his discretion. Accordingly, the State Engineer's
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1 Ruling Number 5875 is VACATED AND REMANDED for further
2 proceedings consistent with this decision.

3 IT IS SO ORDERED.

4 Dated this 15th day of October, 2009.

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7 NORMAN C. ROBISON
8 SENIOR DISTRICT JUDGE
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